DATE: February 7, 1996

Case No.: 94-ERA-27

In the Matter of

EDWARD F. BEACHAM
Complainant

v.

PAI CORPORATION
Respondent

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

ORDER DENYING RESPONDENT'S REQUEST FOR DISMISSAL OF COMPLAINT DUE TO LACK OF SUBJECT MATTER JURISDICTION

This case involves a complaint by Edward F. Beacham (Complainant or Beacham) brought under the Energy Reorganization Act (ERA), 42 U.S.C. §5851, alleging discrimination and wrongful termination of employment by the Respondent, PAI Corporation.

This matter comes before the undersigned Administrative Law Judge at this time for a ruling on the Respondent's request for dismissal of the complaint based on an Affirmative Defense Of Lack Of Subject Matter Jurisdiction. The Complainant has filed an Opposition to the Respondent's request for dismissal. The matter has been fully briefed by both parties.

BACKGROUND

PAI Corporation (PAI), Respondent, is a scientific and technical consulting firm. The Complainant, Edward F. Beacham, was hired by PAI as a Quality Assurance Specialist and worked on a temporary or part-time basis from May 1993 to September 1993, when he was made a permanent, full-time employee. Shortly thereafter, on November 19, 1993, his employment was terminated. As a PAI employee, Mr. Beacham performed work in connection with two PAI contracts. The first contract was between the United States Department of Energy (DOE) and PAI. In accordance with the contract, PAI was to provide consulting services to the staff of the DOE Assistant Manager for Facility Operations at the DOE's Savannah River Operations Office. The second contract involved a subcontract for PAI to provide technical services to PRC Environmental Management, Inc. (PRC). PRC had a prime contract with DOE to provide technical support services for Environmental Restoration and Waste Management Organization at the DOE's Savannah River

Operations Office. While employed by PAI, Beacham worked in connection with tasks assigned to PAI pursuant to these two contracts - the DOE/PAI contract and the PRC/PAI subcontract.

In the case of the Savannah River Plant, the contractor, Westinghouse Savannah River Company (WSRC), received a report from the DOE Tiger Team[1] listing deficiencies found. WSRC prepared responses and guidelines for corrections of the deficiencies and gave anticipated dates for completion of the corrections. PAI contracted with DOE to evaluate WSRC's response packages. PAI also contracted with PRC for further evaluation. Beacham's job was to review the WSRC response packages for PAI.

Beacham alleges that in one particular instance, he visited the site to test whether the employees in that area had been informed of "new evacuation plans." He determined that only a small number of the employees knew of the plan and based on these findings, he refused to approve the package. He was advised that he overstepped his authority and was asked to revise his evaluation. Complainant revised his evaluation although he still rejected the package on October 22, 1993. He was terminated on November 19, 1993. Complainant alleges that he was fired after he declined to accept inadequate packages, as directed by his employer, PAI. Beacham then brought this action alleging that his employment was terminated in violation of the employee protection provisions of the Energy Reorganization Act.

Respondent alleges that Beacham's technical skills were poor; that his supervisors found his reports to be unacceptable due to errors in grammar, spelling, format, organization and style; and that when PAI had no more work available for which Mr. Beacham was qualified, PAI terminated his employment.

DISCUSSION AND APPLICABLE LAW

The Respondent argues that Beacham's complaint against PAI should be dismissed for lack of subject matter jurisdiction because PAI is not an "employer" as defined by 42 U.S.C. §5851, and therefore, is not subject to the Act.

The Energy Reorganization Act provides as follows:

§ 5851. Employee protection

(a) Discrimination against employee

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[1] "Tiger Teams" were special audit teams, commissioned by the Department of Energy in the early 1990's, to assess and evaluate conditions at nuclear weapons production sites such as the Savannah River Plant.

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.];

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

(2) For purposes of this section, the term "employer includes-

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

> (C) a contractor or subcontractor of such a licensee or applicant; and
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> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

The parties agree that PAI is not an employer as defined by subsections (A) "a licensee of the Commission ....." ; (B) "an applicant for a license from the Commission .... ;" or (C) "a contractor or subcontractor of such licensee or applicant." Respondent's argument lies in the interpretation of subsection (D) "a contractor or subcontractor of the Department of Energy that is ***indemnified*** under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d))...." Respondent argues that because the contract between the parties does not include an indemnification provision, then it does not come within the definition of an "employer" as required by 42 U.S.C. §5851.

In support of its argument, Respondent cites *Adams v. Dole,* 927 F.2d 771 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991), in which the United States Court of Appeals for the Fourth Circuit adopted the Secretary of Labor's interpretation of the definition of "employer". At the time *Adams v. Dole* was decided by the Fourth Circuit, 42 U.S.C. §5851 provided in pertinent part:

> **(a) Discrimination against employee**
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> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

In *Adams*, the petitioner was employed by B.F. Shaw Company which was under contract to operate the Department of Energy owned Savannah River Plant. The Secretary of Labor dismissed the complaint filed by Adams for "lack of jurisdiction" stating that the employee protection provisions of §210 of the Energy Reorganization Act applied only to employees of Nuclear Regulatory Commission licensees, licensee applicants, and their contractors. The Secretary stated that these provisions did not apply to employees of the Department of Energy contractors who operated facilities owned by the Department of Energy noting that the

Department of Energy had its own "whistle-blower procedure". The Fourth Circuit discussed the matter at some length and affirmed the Secretary's interpretation that the "including" clause which follows the term "employer" at 42 U.S.C. §5851 (a) is not meant to be illustrative, but rather definitional and concluded that Congress, by so defining "employer," intended to exclude all persons who do not fall within the specified categories from the application of the employee protection provisions, including employees of DOE contractors. *Adams*, 927 F.2d at 777.

In 1992, Congress amended 42 U.S.C. §5851. The amendment placed the definition of "employer" into four separate subsections. Added to the definition of "employer" at subsection 5851(a)(2) was:

> (D) a contractor or subcontractor of the Department of Energy that is *indemnified* by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), ...

The Respondent argues that PAI is not indemnified and, therefore, is not an employer within the meaning of the Act. The Complainant argues that even though the contract and subcontract with PAI contain no specific indemnification clause, PAI is indemnified and therefore, subject to the whistleblower protection provisions of 42 U.S.C. §5851. Complainant argues that PAI is indemnified under:

1. DOE acquisition regulations interpreting the Price Anderson Act Amendments of 1988, namely, the February 1991 Department of Energy Acquisition Regulations (DEARs) governing contractor indemnification.

2. Government procurement contract doctrine, the "Christian Doctrine" holds that "a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is deemed included in a contract by operation of law"

3. Case law governing the statutory protection of nuclear quality controls inspectors. As a matter of public policy, the conduct of nuclear quality control inspectors is an internal protected activity for safety reasons and to exempt PAI from the requirements of the Price Anderson Act would set a dangerous precedent and conflict with established case law. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984).

The Price Anderson Act Amendments of 1988 (PAAA) state that "[t]he Secretary shall, until August 1, 2002, enter into agreements of indemnification . . . with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability, ..." 42 U.S.C. §2210(d)(1)(A).

42 U.S.C. §2210(d)(1)(A) provides as follows:

> (d) Indemnification of contractors by Department of Energy
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> (1)(A) In addition to any other authority the Secretary of Energy may have, . . . the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this section with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

The Department of Energy Acquisition Regulation ("DEAR") implementing Section 170(d) of the Atomic Energy Act defines "public liability" as:

> *Public liability* means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation), except: (1) Claims under State of Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (2) claims arising out of an act of war; and (3) whatever used in subsections a., c., and k. of section 170 of the Atomic Energy Act of 1954, as amended, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. *Public liability* also includes damage to property of persons indemnified: Provided, that such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

In response to the Price Anderson Act, DOE drafted a Nuclear Hazard Indemnity Agreement mandating indemnification clauses in all DOE contracts involving the risk of public liability. *Department of Energy Acquisition Regulation* 952.250-70(c)(1). In implementing

the rule, which was subject to Notice and Comment per the Administrative Procedure Act, 5 U.S.C. 552 *et seq*, DOE wrote: "Generally, after the enactment of the PAAA, the indemnification applies mandatorily to DOE contractors and any other person who may be liable for public liability from a nuclear incident or precautionary evacuation arising out of contractual activities." *Acquisition Regulation: Nuclear Hazard Indemnity Clauses,* 56 Fed. Reg. 57824 (1991)(to be codified at 48 C.F.R. §§950, 952, 970).

The Complainant cites the case of *G.L. Christian and Assoc. v. United States,* 312 F.2d 418, *aff'd on reh'g*, 320 F.2d 345, 160 Ct. Cl. 58 (1963), as "authority for `reading in' the nuclear hazards indemnity provision into the PAI contracts." In *Christian*, the Court of Claims held that "a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in the contract by operation of law." *S.J. Amoroso Constr. Co. v. United States,* 12 F.3d 1072, 1075 (Fed. Cir. 1993), citing *Christian*, 320 F.2d at 345.

A review of the legislative history surrounding the 1992 amendments reveals that the purpose of Part D was to "broaden the coverage of existing whistleblower protection provisions to include . . . the Department of Energy, a contractor or subcontractor at a Department of Energy Nuclear facility, or any other employer engaged in any other activity under the ERA or Atomic Energy Act of 1954." H.R. Rep. No. 102-474, 102d Cong., 2d Sess. at 78-79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 2296-97. It was cases like *Adams*, 927 F.2d at 771, and *Bricker v. Rockwell Intern. Corp.*, 22 F.3d 871 (9th Cir.), *cert denied*, 115 S. Ct. 195 (1993), which both held that §5851, as originally written, did not apply to DOE contractors or subcontractors, that prompted Congress to add Part D to the Act. *See* 138 Cong. Rec. H11376 (daily ed. Oct. 5, 1992) (statement of Rep. Wyden). The present case, involving an employee of a DOE contractor, mirrors the situation envisioned by Congress when they amended the Act. To find that the lack of indemnification language in the contract prevents the Complainant from availing himself to the Act would be in direct conflict with both the overall purpose of the amendment[2] and the long held principles that the Act is to be liberally construed in favor of the complainant. *Brock v. Roadway Express*, 481 U.S. 252 (1987); *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 479 (3d Cir.), *cert. denied*, 114 S. Ct. 439 (1993).

Beyond the intent enumerated by Congress, the Price Anderson

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[2] Indeed, the legislative history surrounding the amendment makes no mention of the indemnification clause; instead, it centered on the purpose of the amendment - to broaden the coverage of the Act by including contractors and subcontractors as DOE employers.

Act Amendments and the resulting DOE acquisition regulations command inclusion of indemnification clauses in DOE contracts. The Price Anderson Act Amendments of 1988 state that "[t]he Secretary *shall* . . . enter into agreements of indemnification . . . with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability, ..." 42 U.S.C. §2210(d)(1)(A). For their part, DOE drafted a Nuclear Hazard Indemnity Agreement mandating indemnification clauses in all DOE contracts involving the risk of public liability. *Department of Energy Acquisition Regulation* 952.250-70(c)(1). DOE reiterated this belief in subsequent Notice and Comment submissions per the Administrative Procedures Act. *Acquisition Regulation: Nuclear Hazard Indemnity Clauses,* 56 Fed. Reg. 57824 (1991)(to be codified at 48 C.F.R. §§950, 952, 970). The mandatory inclusion language contemplated in both the PAAA and DOE acquisition regulations facilitates a "reading in" of the indemnification language into the PAI contract. A narrow reading of the Act would encourage employers to intentionally leave out indemnity language in an effort to evade the whistleblower protection provisions of the Act. The legislative history shows that this was not Congress' intended result when they amended the Act to include Part D.

Incumbent with the "reading in" of an indemnification clause is a showing that the work performed under the contract involved a risk of public liability. While I make no specific finding on the issue, my review of the record shows that the Complainant's duties under the contract arguably involved a risk of public liability. Given the overall intent of the amendment, and charged with the duty to liberally construe the Act in favor of the complainant, this is enough to support the Act's application to PAI.

For the foregoing reasons, I find that PAI is an employer within the meaning of the Energy Reorganization Act, and Respondent's Request for Dismissal of the Complaint on the basis of lack of Subject Matter Jurisdiction is hereby **DENIED.**

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ROBERT L. HILLYARD
Administrative Law Judge